Supreme Court, U.S.
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No. 00-140

IN THE

Supreme Court of the United States

UNIVERSAL BANCARD SYSTEMS, INC., a New York corporation,

Petitioner,

v.

BANKCARD AMERICA, INC., an Illinois corporation, SAMUEL BUCHBINDER, and PAUL ALPERSTEIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Racketeer Influenced and Corrupt Organizations Act (RICO) Counterdefendants' objections to the RICO jury instruction in this case, were sufficient under Fed.R.Civ.P. 51.

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STATEMENT OF THE CASE

The Petition for Writ of Certiorari involves the counterclaims (Document 87) filed by Universal Bancard, Inc. ("Universal") against Samuel Buchbinder ("Buchbinder") and Paul Alperstein ("Alperstein"), alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). (18 U.S.C. §1961, et seq.). The lower court ordered a new trial based upon "serious errors" in the RICO instruction given to the jury in the first trial (203 F.3d 477, 485), and the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") affirmed on those grounds. (203 F. 3d 477, 487.)

As summarized by the Seventh Circuit, and stated more fully in Universal's Petition, the parties to this case operated at various levels in the credit card industry. (Pet. at 3-4.) Buchbinder and Alperstein were principals of Bankcard America, Inc., ("Bankcard") the independent sales organization ("ISO") which would contract with a credit card processing bank, and would sign up merchants and provide equipment for credit card processing with the bank. (Pet. at 3.) The ISO, Bankcard, would sometimes contract with sub-ISOs to do some of the work of signing up and servicing merchants' accounts. (Pet. at 3.) Universal contracted to be a sub-ISO for Bankcard (Pet. at 4.) Universal's RICO counterclaims alleged that Buchbinder and Alperstein conducted Bankcard's affairs through a pattern of racketeering activity, in violation of 18 U.S.C. §§1962(a), (b), (c), and conspired to conduct Bankcard's affairs through a pattern of racketeering activity in violation of 18 U.S.C. §1962(d). (Document 87.) Universal claimed that Buchbinder and Alperstein devised a scheme to defraud

Universal, as well as other sub-ISOs who had contracted with Bankcard, and that the alleged scheme to defraud included what Universal characterized as 37 separate predicate acts of mail fraud (18 U.S.C. §1341), wire fraud (18 U.S.C. §1343), and bank fraud (18 U.S.C. §1344), as part of a pattern of racketeering activity. (Document 87, pp. 10-12, 17-18, Ex. D.)

The parties filed a joint Final Pretrial Order prior to the scheduled jury trial before the Honorable Brian Barnett Duff. (Document 73.) As part of the Final Pretrial Order, both counterplaintiff and counterdefendants submitted their respective proposed instructions to the jury on the RICO counterclaims. (Document 73.) After the trial began, a number of jury instruction conferences were held. At the first jury instruction conference, the trial court essentially rejected all of the RICO instructions submitted by the parties and informed the parties that the Pattern Jury Instructions for the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit"), would be utilized for all procedural issues, as well as substantive issues of federal law, such as the instructions on RICO (Transcript, pp. 871, 887.)[1] At a second jury instruction conference, counsel and the Court addressed the jury instruction on the RICO claims. (Transcript, pp. 1024, 1034.) At this second conference, the parties and the court agreed that the Fifth Circuit's pattern RICO instruction that the parties had submitted should be modified to delete those portions relating to violations of 18 U.S.C. §§1962(a) and (b), since Universal's claims had alleged violations of 18 U.S.C. §§1962(c) and (d). (Transcript, p. 1034.) At this

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[1] Bachlander and Alperstein (and their counsel) are referenced in the transcript, collectively for all counterdefendants, as "Bankcard".

second conference the parties and the court also agreed on various other minor modifications to the Fifth Circuit pattern RICO instruction:

> *The Court:* ...
>
> Now, first, still on the pattern jury on RICO, Fifth Circuit, Universal Bancard consistently refers to itself as defendant-counterplaintiff. Again, we talked about that. I don't know if that is confusing or not. You think about it, but if you do, why don't you refer to them in this instance as referring to the party Universal or simply counterplaintiff in the RICO claims, because in the RICO claims, there's only one common plaintiff.
>
> Right? ...
>
> *The Court:* Okay. Second, the definition of racketeering activity refers to mail fraud.
>
> You alleged wire fraud, didn't you?
>
> *[Counsel for Universal]:* Both, Your Honor....

The Court: Third, the definition of pattern of racketeering activity includes material which is bracketed in the pattern instruction. Now, specifically, the phrase "and that both of the acts occurred after October 15, 1970." do both of them have to occur after that date? ...

The Court: Now fourth, there is inconsistency in referring to the counterdefendant and the counterdefendants, since there is more than one counterdefendant, it should be consistent and clear throughout the instruction. Go through it and be sure you are clear on whether your are using "counterdefendant" or "counterdefendants."

But on the RICO, you have only got one counterdefendant.

[Counsel for Universal]: No, Your Honor. We have Paul Alperstein....

Fifth, on page 6 of that instruction, "Also - - that is in quotes - - "the counterplaintiff also has alleged that counterdefendants have violated section 1962(c) of

RICO."

Should that be deleted?

[Counsel for Universal]: We did allege 1962(c)....

The Court: Six, on page 6 of the instructions, "related" in the definition of employed by or associated with should be "relate."

Seventh, on page 7 of the instruction following the four elements, the "conduct" should be "conducted."

There are other typos which should be corrected throughout the instructions. So you should give it a close reading. Okay?

[Counsel for Universal]: Okay Your Honor.

The Court: On page 11 in the third paragraph, the instruction provides, "However, in accordance with my instructions during the trial, you may not consider any evidence ..."

> *The Court:* Nine, regarding co-conspirators, it appears in this instruction like you are alleging that all the co-conspirators are also counterdefendants. If that's true, this paragraph as is can be given. If not true, then the individual co-conspirators have to be individually listed as well as the individual counterdefendant. Are they all co-defendants - - all co-conspirators also counterdefendants?

(Transcript, pp. 1034-1039.) After the parties had agreed upon those modifications to the RICO jury instruction, the parties returned for a third jury instruction conference, bringing along their "agreed" instruction on RICO – the Fifth Circuit pattern instruction with the modifications previously addressed. (Transcript, p. 1086.) It was then agreed to further modify the RICO jury instruction to delete any reference to "security fraud" in the instruction's definition of "racketeering activity", since Universal admittedly was not alleging security fraud as part of the RICO claims:

> *The Court:* The agreed instruction on RICO, 16. The instruction mentions security fraud when defining racketeering activity. Are you really asserting security fraud as a basis for your claim?
>
> *[Counsel for Universal]:* No, we're

not, your Honor.

The Court: Then you should take it out.

(Transcript, pp. 1086.) It was at this point in the proceedings that any reference was first made to what was later to become "Exhibit A: Predicate Acts" of the RICO jury instruction. However, the Court's first reference to "Exhibit A" was not in connection with the jury instructions. "Exhibit A" was attached to Universal's amendment to its counterclaims made after the close of evidence, to include violations of 18 U.S.C. §§1962(a) and (b), and was addressed in connection with the counterdefendants' pending motion for judgment as a matter of law:

The Court: Back on.

Now I started to say, I think, Bankcard filed a motion for judgment as a matter of law on Section 1962(c) and 1962(d) of the RICO counts. Now Universal has amended its counterclaims to include 1962(a) and 1962(b).

And so Bankcard has to - - to decide what they are going to do about that. And as to Exhibit A, outlining the predicate acts, I want to have a discussion as to whether they should be separated by counter-

> defendant or lumped together as it currently is.
>
> Now that's a little vague. I don't think we're going to finish that before lunch.
>
> *[Counsel for Universal]:* Your Honor, I'm sorry did you receive our opposition to their motion for judgment as a matter of law?
>
> *The Court:* Pass it up.

(Transcript, p. 1089). With respect to the RICO jury instruction, at this third jury instruction conference, counsel for Buchbinder and Alperstein disputed Universal's claim that Buchbinder and Alperstein had agreed or stipulated to those portions of the RICO jury instruction relating to violations of 18 U.S.C. §§1962(a) and (b):

> *[Counsel for Bankcard]:* In their amendment to the RICO counts, they have alleged - - -
>
> *The Court:* Counts 2 and 3.
>
> *[Counsel for Bankcard]:* Counts 2 and 3, yes, sir. They have alleged violations of Section 1962 - -

The Court: Yes.

[Counsel for Bankcard]: A, B, C and D.

The Court: Right.

[Counsel for Bankcard]: I don't think there is any evidence at all to support A and B....

[Counsel for Universal]: On A and B. They are part of the stipulated jury instructions.

The Court: Well, I don't think we should start changing stipulations.

[Counsel for Universal]: That's what I - -

[Counsel for Bankcard]: I didn't agree to A and B. I never agreed to that.

(Transcript, p. 1164.)

In spite of the lower court's urging that the parties attempt to agree on jury instructions, by the fourth and final jury instruction "conference", there were still disputes regarding certain instructions. (Transcript, pp. 1170-1171.) By this time, the jury had already been left sitting idle for a

period of time, waiting to hear closing arguments and begin deliberations and the court informed the parties that:

> *The Court*: Now, I'm going to go through them and I'm going to rule.
>
> If you object, I'm going to let you just object, but I don't want any more arguments because you made your arguments I think quite clearly. All right?

(Transcript, p. 1171.) Included among the instructions the parties apparently still had not agreed upon was the RICO jury instruction. In spite of the previous modifications agreed upon by the parties, Universal submitted for the first time a RICO jury instruction with "Exhibit A: Predicate Acts", added to what had previously been the Fifth Circuit pattern RICO instruction with the parties' and court's minor modifications:

> *The Court:* Now, Bankcard objects to Exhibit A in the RICO instruction which outlines the alleged predicate act. I think I have it here, don't I? Isn't it here? No.
>
> *[Counsel for Universal]:* That document is also attached to the second amended complaint, has a list of all the acts in furtherance of the

RICO claim.

....

[Counsel for Universal]: I'm just saying that that list of predicate acts, which was taken from the testimony of the various people that were presented to the Court was also

attached and incorporated by reference in the second amended complaint as the summation of all of the predicate acts.

The Court: The second amended complaint is not evidence.

[Counsel for Universal]: No, I know that, but I'm just saying that this was indeed –

The Court: Okay. Why don't you stretch your legs while I read this.

....

The Court: Predicate acts. Okay, I see them. Does the instruction – I don't have it in front of me – does the instruction make it clear that not every predicate act has to be proven?

[Counsel for Universal]: The RICO instruction –

[Counsel for Bankcard]: Do you have it?

[Counsel for Universal]: It has --

[Counsel for Universal}: That will

be a problem.

[Counsel for Universal]: It just says the predicate acts we allege are listed.

The Court: They have to be proved, some of them. How many?

[Counsel for Universal]: Well, two only. I would say that if you prove two or more – as a matter of fact, the verdict says if we prove – I don't know whether the verdict does say that.

The Court: Well, Look it up and check it out.

[Counsel for Universal]: Two or more of the predicate acts.

The Court: That's what I'm asking, does it say that they do not all have to be proved or words to that effect.

Any why do you throw in 60 or whatever it is when you only need two?

[Counsel for Universal]: I suppose, your Honor, to show how

widespread this scheme was.

The Court: I'm not sure that every one of those all by itself would be an adequate predicate act. Some of them might be acts in furtherance of conspiracy but are they predicate acts? What is the definition of a predicate act?

[Counsel for Universal]: It's use of mail or wire in order to further the scheme.

The Court: Were these all mail and wire?

[Counsel for Universal]: Yes, your Honor.

The Court: All right, we will throw

> them in if you want, but they're going to take the time to read them all. It's all right by me.
>
> *[Counsel for Bankcard]:* We want our objection shown.
>
> *The Court:* What's your objection?
>
> *[Counsel for Bankcard]:* Because we believe having these come from
>
> the Court is giving their evidence. It's not boiled down.
>
> *The Court:* All you need to say is these are the predicate acts alleged.
>
> *[Counsel for Bankcard]:* We object because there is no indication of the level of intent to commit fraud that is necessary for these to be predicate acts under mail fraud and wire fraud statutes.

(Transcript, pp. 1200-1203.)

When this final jury instruction conference concluded at 12:30 p.m., the Court adjourned until 1:15 p.m., when the parties made their closing arguments. (Transcript, pp. 1207-1210.) Closing arguments were followed by a ten-minute break for the jury, just prior to the court's instructions to the

jury, during which Buchbinder and Alperstein reminded the court of its objections to the RICO instruction. (Transcript, p. 1285.) At this juncture, the eleventh hour debate regarding the RICO jury instruction did not revisit the court's decision to give Universal's new RICO instruction with its "Exhibit A: Predicate Acts", over counterdefendants' objections, but instead, whether in giving the instruction the court should actually read aloud to the jury the entire instruction and its 37 "predicate acts":

> *The Court:* Thank you. All right, ladies and gentlemen, it appears to
>
> me that reading these is going to take awhile, so I think we probably better give you a break, and this time it really will only be ten minutes.
>
> Everybody please rise. I'm going to instruct you and then you will have the case.
>
> (The following proceedings transpired out of the presence of the jury)
>
> *The Court:* I have these instructions, and as I said, next time please use large print. I have to read all this stuff and it's hard for me to calculate how long this is going to take to read, but it looks to me like it's going

to take close to an hour. Maybe not. We'll see.

Now, I thought we agreed that you were not going to include these predicate acts in here in the same fashion that you did, but what you have done is you have made it an exhibit. I don't know -- I mean an appendix. I have never heard of an appendix being involved in jury instructions before, but it's not a bad idea. Nevertheless, it does ask me to

read a very lengthy set of single-spaced typing.

Do you want me to read all that? Is that your intention?

[Counsel for Universal]: That was originally, your Honor.

The Court: I thought I said to you why did you include all these acts when you only need a few.

[Counsel for Universal]: That's right. Your Honor, we would be happy to pick out a few for you to read.

The Court: Do you agree with that, Mr. Hamman?

[Counsel for Bankcard]: That would certainly be preferable to that enormous list.

The Court: Well, look at it right now during this break. I'm going to pull them out for you, what you call Exhibit A, and decide what you really want to use. I'll send the appendix in if you want, but I'm not going to read them ....

Short break. Five minutes.

The Court: Gentlemen, I appreciate the fact that you have taken the predicate acts Exhibit A that we discussed and you have marked the ones that you would like me to read. You didn't narrow them down very much, you asked me to read at least half of them, more than half. So that's two pages of single space, I guess, or a page and half anyway, and we will do it.

But also I would say to you that my – there is some concern that we would be sending something

in to the jury room that wasn't read, and Universal says that all of these items are in evidence. Bankcard said that they were not all in evidence. If they were all in evidence, I wouldn't worry about sending it in to the jury room if you both agree. If they're not all in evidence, I think we should know where the objections are and you haven't given me any objections.

Now, it's a civil case, and you can waive anything you want if you want in a civil case. We are not talking about constitutional rights.

But I don't want it to be error. But if both sides agree that I should read the ones that are checked and send the exhibits in, I will.

[Counsel for Bankcard]: Well, your Honor, we keep our objection to the exhibit or to that listing.

The Court: What's that now?

[Counsel for Bankcard]: Well, we object that the way its phrased it's prejudicial. But I think we mentioned that back in chambers.

> *The Court:* I've got to know what you want right now.
>
> *[Counsel for Bankcard]:* Right now we would object to sending anything back to the jury that isn't read.
> *The Court:* All right, I'll read them all.
>
> Bring them in.

(Transcript, pp. 1280-1286.)

The court proceeded to instruct the jury on various procedural and substantive matters of law, and then paused for another sidebar with counsel just prior to reading the

RICO instruction to the jury, once again, to discuss whether the court should have to read the RICO jury instruction in its entirety, or namely, all 37 "predicate acts" included in "Exhibit A".

> (The following proceedings transpired out of the presence of the jury)
>
> *The Court:* I want to know what you want to do with all these things. I thought we had agreed that we weren't going to read this. But we did say in the context there that it was here and you said, Mr. Hamman, that you want them all read, is that

right?

[Counsel for Bankcard]: In light of circumstances, while I object to them I would not require they be read.

The Court: What's your feeling?

[Counsel for Universal]: Just those marked are the only ones I want read.

The Court: Oh, you want me to read them aloud?

[Counsel for Universal]: Yes.

The Court: The ones that are marked.

[Counsel for Bankcard]: That's fine, subject to my other objections.

The Court: Okay.

[Counsel for Bankcard]: Thank you.

(The following proceedings transpired in the presence of the jury)

The Court: That sidebar, ladies and gentlemen, was to try to save a little

> time. I have here the exhibit to which I referred earlier that was attached and it is titled as Exhibit A: Predicate Acts.
>
> In the instructions I referred to predicate acts and how many, two or more, and so forth that had to be found under different circumstances, and this list includes 37 of them. Now, the parties have
>
> agreed that it is not necessary for me to read all 37 of them. However, I will send all 37 of them in to the jury room, and I have been requested to read certain ones. When you get this exhibit, you will see that the ones I'm
>
> reading are the ones that have a checkmark beside them. And I wish that this was short, but it's not terribly short.
>
> Okay. I'll give you the numbers also…

(Transcript, pp. 1320-1321.)

The jury returned verdicts under RICO in favor of Universal and against Buchbinder in the amount of $1,115,000.00, and also in favor of Universal and against

Alperstein in the amount of $1,115,000.00. (Document 97.) The RICO damages were then trebled pursuant to 18 U.S.C. §1964(c), so that judgment was entered in favor of Universal in the amount of $3,345,000.00 against Buchbinder, and also in favor of Universal and against Alperstein in the amount of $3,345,000.00. (Pet., App. pp. 25-26.) In ruling on Buchbinder's and Alperstein's Motion for a New Trial on the RICO claims, the Honorable Richard A. Posner, Chief Justice of the Seventh Circuit, who was sitting as a District Judge by designation and to whom this case was reassigned when the Honorable Brian Barnett Duff was assigned to inactive status (Pet. at 15.), granted the new trial because of a "cascade of errors", including the faulty instructions on the RICO claim which were given over Buchbinder's and Alperstein's objection. (Pet., App. at 21-22.) After the second trial on the RICO claims ended with a jury verdict and judgment in favor of Buchbinder and Alperstein (Document 209), and the Honorable Richard A. Posner denied Universal's Fed.R.Civ.P. 59 post-trial motion

(Document 226), Universal appealed. (Documents 236, 239, 241.) The Court of Appeals rejected Universal's contention that Buchbinder and Alperstein had waived any objection to the RICO jury instructions, and affirmed the granting of a new trial and the subsequent loss for Universal on the RICO claims. (203 F.3d 477, 487).

REASONS FOR DENYING THE WRIT

Universal presents no compelling reason for a Writ of Certiorari. Rule 10 of this Court states that "[a] petition for a writ of certiorari will be granted only for compelling

reasons", and provides a list "indicat[ing] the character of the reasons the Court considers." Neither of the two reasons Universal proffers is applicable here. In this case the Seventh Circuit neither entered a decision in conflict with the decision of another United States Court of Appeals, nor did it sanction any lower court's decision that "so far departed from the accepted and usual course of judicial proceedings." Both the Seventh Circuit's ruling and the record below support a proper, as well as the usual and accepted, statement of the law and application of the requirements of Fed.R.Civ.P. 51.

Universal misstates the question presented by portraying it as three separate questions involving "general objections" to a jury instruction. However, this case does not present a fact situation where a party has either stated generally that it "objects" in reference to an entire jury instruction while failing to state what portion or aspect of the instruction is objectionable, or has indicated that it is objecting to an instruction but without stating the grounds. Universal is alleging error in the lower court's post trial decision, affirmed by the Seventh Circuit, that Buchbinder's and Alperstein's objections to the RICO jury instructions were sufficient to meet the requirements of Fed.R.Civ.P. 51.

As a matter of law, the Seventh Circuit is in harmony with long-standing principals of judicial procedure, with this Court, and with the courts of appeals of other federal judicial circuits, with respect to the prerequisite of objections to jury instructions and the requirements of Fed.R.Civ.P. 51. "Rule 51 of the Federal Rules of Civil Procedure specifically commands that no party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict." *Deppe v. Tripp*, 863 F.2d 1356, 1361-62 (7th Cir. 1988). To satisfy Rule 51 the

party must object and state the grounds for the objection. *Jardien v. Winston Network, Incorporated*, 888 F.2d 1151, 1157 (7th Cir. 1989). The litigant "must ensure that the record contains sufficient information for this Court to ascertain the basis for the objection at the jury instruction conference." Id. However, this requirement does not mean that only the most specific or exact language must be used, it only requires that the objecting party make its position clear. *Dawson v. New York Life Insurance Company*, 135 F.3d 1158, 1165 (7th Cir. 1998). Indeed, in determining whether a litigant has satisfied Fed.R.Civ.P. 51, the Seventh Circuit has stated: "[w]e will not parse the record to find an implied objection when the litigant could have simply articulated an objection at the jury instruction conference." Jardien, 888 F.2d 1151, 1157.

Universal's Petition demonstrates that, under the particular facts of this case, there exists no conflict or departure from the applicable standards. *See McDermott v. Severe*, 202 U.S. 600, 610 (1906) (no specific objection brought to court's attention; the only objection was a general one to an entire damages instruction that contained a number of rules of damages*); Beaver v. Taylor*, 93 U.S. 46, 54-55 (1876) (objection that was stated generally as being "to so much of the charge of the Court as given, as was in conflict with and variant from the several propositions" presented by the party, could not be sustained). *Block v. Darling*, 140 U.S. 234, 238 (1891) (exception "to all and each part" stated as to entire charge gave no information whatsoever as to what was in the mind of the excepting party".); *Palmer v. Hoffman*, 318 U.S. 109, 119 (1943) (petitioner's general objection to charge failed to even specify as to which cause of action the charge was allegedly erroneous). *Linn v.*

Andover Newton Theological School, Inc., 874 F.2d, 1,5 (1st Cir. 1989) (trial judge was not required to act as "mind reader" in order to ascertain some basis for party's request for an instruction and that what defendant was really objecting to was use of wrong version of applicable regulation as basis for instructions on the law); *Hardware Mutual Insurance Co. v. Lukken*, 372 F.2d 8, 13 (10th Cir. 1967) (party's objection not specific enough to support review where party never requested that an instruction be given on doctrine of law party later sought to invoke; instead party simply stated that it was "re-reques[ting]" that all of its instructions be given, and party made no objection at all – not even a general one – to instructions that were given); *Dunn v. HOVIC*, 1 F.3d 1371, 1379 (3rd Cir. 1993) (party's challenge to instruction that was allegedly "constitutionally infirm" with respect to charge regarding punitive damages, where party stated that charge as a whole was "unconstitutionally uninformed" and yet provided no suggestion of what standard should be, was too general to satisfy Fed.R.Civ.P. 51).

As the record and the Seventh Circuit's decision amply demonstrate, Buchbinder and Alperstein were very specific about what portion or provisions of the RICO jury instruction they were objecting to, as well as the basis for their objections. Universal's Petition misstates the facts of this case relating to the RICO jury instruction. Contrary to Universal's assertion, the parties ultimately had no "agreed" RICO instruction. At the second jury instruction conference, the parties had agreed on the RICO instruction, i.e., the Fifth Circuit's pattern instruction on RICO with those minor modifications which were reflected on the record. Then

when the parties returned to the third jury instruction conference with their "agreed" RICO instruction, it was further agreed that any references to "security fraud" would be omitted. However, at this third conference Buchbinder and Alperstein disputed whether the previously agreed upon instruction included violations of 18 U.S.C. §1962(a) and (b). Finally, when the parties and court met for the fourth and last jury instruction conference, the parties no longer had an "agreed" RICO instruction. Instead, Universal submitted, for the first time, a new and substantially different RICO instruction -- the instruction ultimately given, which incorporated "Exhibit A" and its list of 37 predicate acts.[2]

The record is clear that this was not an agreed instruction on RICO. Moreover, there is no need to search for implied objections. When Universal first tendered this instruction, counsel for Buchbinder and Alperstein promptly stated their objections, in accordance with the court's directive at the beginning of the conference that: "If you object, I'm going to let you just object, but I don't want any more arguments...." (Transcript, p. 1171.) The court was obviously informed -- because it even acknowledged on the record -- what portions of the RICO instruction Buchbinder and Alperstein were objecting to, which was followed by counsel's statements regarding the grounds for the

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[2] Universal claims that the "agreed" RICO instruction (or, as Buchbinder and Alperstein would characterize it – the *previously* agreed upon version of the RICO instruction), included a reference to "Exhibit A". This claim is not supported by the record. In fact, it appears incongruous that the previously agreed upon RICO instruction would reference "Exhibit A" when there was no "Exhibit A", or even any discussion or reference to it, until the closing day of trial when Universal submitted it at the fourth jury instruction conference.

objections. (Transcript, pp. 1200 – 1203.) In addition, when the lower court itself seemed confused regarding whether or not it had been determined that the new RICO instruction with "Exhibit A" would be given, and whether or not it should read the instruction to the jury (Transcript, p. 1281) counsel for Buchbinder and Alperstein twice reminded the court of their objections. (Transcript, pp. 1280, 1320).[3]

Although Universal states that something more should have been required of Buchbinder and Alperstein, such as submitting their own proposed "Exhibit A" , or redrafting Universal's "Exhibit A" and its 37 paragraphs to eliminate the paragraphs objected to because of facts that were not in evidence, Buchbinder's and Alperstein's counsel would have had approximately 15 minutes to accomplish such a feat.[4] Moreover, Rule 51 does not contain any

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[3] Universal claims, although primarily in reference to its allegation regarding the unavailability of the doctrine of "plain error", that another part of the instruction discusses the level of intent necessary for mail fraud and wire fraud, and that "some" of the 37 "predicate acts" included the requisite mental state while "others" did not. In fact, more than half of the 37 "predicate acts" contained no reference to any mental state or intent. This made "Exhibit A", in its entirety, even more prejudicial because the inclusion of a mental state requirement in some of the 37 acts, and the omission from "others", would lead the jury to believe that an intent to defraud was required only for certain acts as delineated, while not required for the "others".

[4] In *S.A. Healy Company v. Milwaukee Metropolitan Sewerage District,* 50 F.3d. 476, 481 (7th Cir. 1995), Chief Judge Posner states that "[w]hen an instruction is given to which no evidence corresponds, the likely consequence is that the jury ignored it", in reference to one statement in a mitigation of damages instruction in a breach of contract case. The last sentence of the instruction stated that the duty does not require that a party "take an unreasonable risk … or *put itself in a position involving loss of honor or respect. Id.* at 481. (emphasis supplied). Defendant

language to this effect and has not been interpreted to require that a party submit a new written formal instruction. *See A.B. Baumstimler v. Rankin*, 677 F.2d 1061, 1069 (5th Cir. 1982). *See also Dunn*, 1 F.3d 1371, 1379 (recognizing that a party "need not tender specific language if it has otherwise objected to the inadequacy in an instruction"). Having stated their objections and grounds therefore, Buchbinder and Alperstein preserved their rights to review with respect to errors in the jury instruction on RICO, and those same objections and grounds articulated were the very basis for both the granting of Buchbinder's and Alperstein's motion for a new trial, and the basis upon which the Seventh Circuit affirmed.

Finally, Universal claims that the Seventh Circuit did not invoke the "plain error" doctrine in this case, and that in any event, invocation of the "plain error" doctrine would not be appropriate. Buchbinder and Alperstein submit that the "plain error" doctrine and its availability and/or lack thereof is simply not an issue in this case. As amply demonstrated above, Buchbinder's and Alperstein's objections to the RICO jury instruction clearly met the requirements of Fed.R.Civ.P. 51.

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claimed that the mitigation of damages instruction was given in error because of the last sentence, since that principle would relate only to personal service contracts, not a construction contract like the one at issue there. The court found that any error in giving that instruction was harmless, since defendant never argued that it should be excused from its duty to mitigate because it would have lost honor and respect, thus making it a likely consequence that the jury would ignore that part. There is no analogy between *S. A. Healy Company* and this case, where the jury was given a RICO instruction telling them that Universal was claiming that the 37 incidents or acts were "predicate acts" or acts indictable under federal law, committed by Buchbinder and Alperstein.

CONCLUSION

For the reasons stated herein, the Respondents, Samuel Buchbinder and Paul Alperstein, respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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